No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF, AMENDED PETITION FOR AN ORDER ENFORCING DECREE, FOR INJUNCTIVE RELIEF, AND FOR MODIFICATION OF DECREE, AND BRIEF IN SUPPORT OF MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

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January 11, 1988

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CERTIFICATE OF SERVICE

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v.

STATE OF WYOMING,
Defendant.

MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

The State of Nebraska hereby moves for leave to file its amended petition for an order enforcing the Court's Decree of October 8, 1945, as modified on June 15, 1953, for injunctive relief, and for modification of the Decree.

Respectfully submitted,

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AMENDED PETITION FOR AN ORDER ENFORCING DECREE, FOR INJUNCTIVE RELIEF, AND FOR MODIFICATION OF DECREE

The State of Nebraska hereby petitions the Court for an order enforcing the provisions of its Decree of October 8, 1945, as amended on June 15, 1953, granting injunctive relief, construing the Decree, and, if necessary, modifying the Decree, and in support hereof states:

1. The Court's Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), equitably apportions the waters of the North Platte River among the states of Colorado, Wyoming, and Nebraska.

The Decree was modified and supplemented in 1953 based on the Court's approval of a stipulation among the parties. *Nebraska v. Wyoming*, 345 U.S. 981 (1953).

2. The Court expressly retained jurisdiction in this action for enforcement, supplementation, or modification of the Decree in Article XIII, 325 U.S. at 671, which provides:

> The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:
>
> * * *
>
> (c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;
>
> * * *
>
> (f) Any change in conditions making modification of the decree or granting of further relief necessary or appropriate.

3. The 1945 Decree is premised on the recognition that Pathfinder and Guernsey Reservoirs in Wyoming are operated primarily for the benefit of lands in Nebraska. Consequently, the Decree limits storage of water in those reservoirs to protect water users in Nebraska. As modified in 1953, the Decree provides for the construction and operation of Glendo Reservoir in Wyoming, allocates the reservoir's yield between Wyoming and Nebraska pursuant to contracts with the Bureau of Reclamation, and provides that "[t]he regimen of the

North Platte River below Pathfinder Dam shall not be changed . . ." Paragraph XVII(b).

4. The Decree established an equitable balance of the benefits of the North Platte River and its tributaries by expressly apportioning the irrigation uses of the river above Tri-State Dam and by implicitly establishing a regimen of stream flow for uses below Tri-State Dam, including, but not limited to, uses of the river in Nebraska which were consistent with the irrigation apportionment and which were necessary to maintain and preserve critical wildlife habitat along the North Platte and Platte Rivers in Nebraska.

5. The State of Wyoming is presently violating and threatening to violate the State of Nebraska's equitable apportionment established in the Decree by:

A. Allowing depletion of the flows of the North Platte River through current and proposed state administration of water rights on the Laramie River, a tributary of the North Platte River, in a manner inconsistent with the apportionment in the Decree and the provisions of the Endangered Species Act, Pub. L. 93-205, 87 Stat. 889, 16 U.S.C. §§ 1531-1543.

B. Allowing depletion of the flows of the North Platte River by the proposed construction or authorization of additional pumping, diversion, and storage facilities at the confluence of the Laramie and North Platte Rivers;

C. Allowing depletion of the flows of the North Platte River by the proposed construction of new storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir; and

D. Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion

of North Platte River waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska.

6. The current and imminent actions of the State of Wyoming are inconsistent with and will directly reduce and interfere with existing water uses in Nebraska for irrigation and for maintenance of critical wildlife habitat and thereby disturb and violate the equitable balance of the North Platte River and its tributaries established in the Decree.

7. In addition to enforcing the Decree's apportionment for irrigation uses in Nebraska, the State of Nebraska seeks to have the Court construe the Decree as apportioning waters of the North Platte River to the State of Colorado, the State of Wyoming, and to the State of Nebraska for maintenance of critical wildlife habitat, and, in addition, to construe the Decree as placing restrictions on the State of Colorado's and the State of Wyoming's authority to approve new appropriations of North Platte River waters and restrictions on Colorado's and Wyoming's and the United States' authority to approve construction of new storage projects and their operation of existing storage projects for the purpose of impounding the waters of the North Platte River and its tributaries to the extent that such uses in Colorado or Wyoming would reduce the flows of the river into Nebraska and would thereby reduce the amount of water historically used in Nebraska for irrigation purposes and to maintain and preserve critical wildlife habitat.

8. Alternatively, in addition to enforcing the Decree's apportionment for irrigation uses in Nebraska, the State of Nebraska seeks to have the Court modify the Decree to recognize and provide for changes in the conditions of the North Platte River resulting from or that would result from the State of Colorado's or the State of Wyoming's authorization of new appropriations of the waters of the North Platte River

and its tributaries and the State of Colorado's, the State of Wyoming's, and the United States' authorization of new storage projects and their operation of existing storage projects on the North Platte River and its tributaries and to modify the Decree to recognize and provide for changes in federal and state legislation that recognize the need for the regulation of the flows and storage of the North Platte River and its tributaries for the continued protection of critical wildlife habitat. The proposed modification of the Decree should protect existing critical wildlife habitat in Nebraska by placing restrictions on the State of Colorado's and the State of Wyoming's authority to approve new appropriations of North Platte River waters and restrictions on Colorado's and Wyoming's and the United States' authorization of new storage projects and their operation of existing storage projects on the North Platte River and its tributaries to the extent that such uses in Colorado or Wyoming would reduce the flow of waters passing into Nebraska and would thereby reduce, adversely affect, or eliminate existing critical wildlife habitat in Nebraska.

9. Despite the State of Nebraska's efforts to resolve these matters, no resolution has been reached and no alternative forum exists in which to enforce the apportionment of the North Platte River and its tributaries for irrigation and the protection of critical wildlife habitat or, alternatively, to enforce the apportionment of the North Platte River and its tributaries for irrigation and to apportion the North Platte River and its tributaries in order to protect critical wildlife habitat.

10. Present and threatened violations of the Decree are causing and will cause irreparable injury to the State of Nebraska and its citizens.

11. The State of Nebraska has no effective remedy at law to enforce its rights against the State of Colorado, the State of Wyoming, and the United States of America. Injunctive

relief is necessary to enforce the Decree and to restrain further violations of the Decree.

WHEREFORE, the State of Nebraska prays that the Court enter its order enforcing and modifying the Decree to:

(1) Require the State of Colorado, the State of Wyoming, and the United States and their agencies to comply with the provisions of the Decree of October 8, 1945, as modified on June 15, 1953 in this action;

(2) Enjoin the State of Wyoming and its agencies from authorizing additional depletion of the natural flows of the North Platte River in violation of the State of Nebraska's apportionment under the Decree;

(3) Explicitly recognize the apportionment of North Platte River waters to the State of Colorado, the State of Wyoming, and to the State of Nebraska for maintenance of critical wildlife habitat;

(4) Enjoin the State of Colorado and the State of Wyoming and their agencies from approving new appropriations of the waters of the North Platte River and its tributaries, and to enjoin the State of Colorado, the State of Wyoming, and the United States and their agencies from authorizing or sanctioning construction of new storage projects on the North Platte River and its tributaries which would reduce the flows of the river into Nebraska and would thereby reduce the amount of water historically used in Nebraska to maintain and preserve critical wildlife habitat; and

(5) Provide such other and further relief as the Court shall deem proper, necessary and equitable in the circumstances.

Respectfully submitted,

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BRIEF IN SUPPORT OF MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

STATEMENT OF THE CASE

This is an action to enforce the equitable apportionment made to the State of Nebraska pursuant to the Court's Decree of October 8, 1945, as amended on June 15, 1953, and for injunctive relief against the State of Wyoming for present and threatened depletions of the flows of the North Platte River and its tributaries.

On January 20, 1987, the Court granted Nebraska's motion for leave to file its petition. Wyoming answered the petition on March 18, 1987, counterclaimed against Nebraska, and sought injunctive relief for alleged violations of the Decree.

When originally litigated, the object of the suit was to equitably apportion the waters of the North Platte River and its tributaries among the States of Colorado, Wyoming, and Nebraska for irrigation purposes. Accordingly, certain restrictions were placed on diversions and storage of water in each of the three states. While the Decree does not expressly apportion the waters of the North Platte and its tributaries for purposes other than irrigation, the apportionment has resulted in a certain regimen of stream flow in the three states that has been used for non-irrigation purposes. Encouraged and sanctioned by the passage of federal and state legislation since the entry of the Decree in 1945, the principal instream use of the waters of the North Platte and its tributaries has been for the development and protection of critical wildlife habitat.

STATEMENT OF FACTS

Since the entry of the Court's Decree in 1945 and its modification in 1953, increased scientific knowledge and concern have been focused on the ecological effects of water development for irrigation, industrial, municipal and domestic purposes. *See, e.g.*, Endangered Species Act, 16 U.S.C. §§ 1531-1541 (1982 & 1985 Supp.); National Environmental Policy Act, 42 U.S.C. §§ 4331-4370 (1982 & 1985 Supp.); Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667 (1982 & 1985 Supp.) Fish and Wildlife Conservation Act, 16 U.S.C. §§ 2901-2911 (1982 & 1985 Supp.); Electric Consumers Protection Act of 1986, Pub. L. 99-495, 100 Stat. 1243 (1986). In the North Platte and Platte River valleys, this legislation has been directed, in part, to some 230 species of migratory birds which inhabit the area, six of which are endangered or threatened.

POINTS OF LAW

The preservation and regulation of flows of the North Platte and its tributaries for the protection of critical wildlife habitat presents a basin-wide problem, necessitating affirmative action not simply by the State of Nebraska, but also by the states of Wyoming and Colorado and the United States. Equity requires that the apportionment of the waters of the North Platte River and its tributaries recognize the need to protect critical wildlife habitat in the respective states and that the responsibility of doing so should not be shouldered by any one of the states. The multi-state, federal nature of the problem also requires the participation and cooperation of the United States in the operation of the various federal projects which divert and impound the flows of the North Platte and its tributaries.

The Court has recognized that equitable apportionment embraces more than the quantitative division of an interstate water supply. *Colorado v. New Mexico*, 459 U.S. 176 (1982); *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017 (1982). In the North Platte River and Platte River basins, it is clear that the equitable burdens and benefits of maintaining critical wildlife habitat are interstate in nature and must be subject to the apportionment necessary to protect the ecological balance in the basins.

Pursuant to Supreme Court Rule 9.2 and Federal Rule of Civil Procedure 15(a), leave to amend a pleading "shall be freely given when justice so requires." The object is to promote the exposition of pertinent facts and to avoid piecemeal adjudication of interstate disputes. *See Utah v. United States*, 394 U.S. 89 (1969); *Froman v. Davis*, 371 U.S. 178 (1962). The purpose of Nebraska's amended petition is to assure that all issues relevant to the Court's construction or modification of the Decree are litigated in this proceeding. *See* 3 J. Moore, Moore's Federal Practice Para. 15.08[3], at 15-55 (2nd ed.

1987) ("The clearest cases for leave to amend are correction of an insufficient claim or defense and amplification of previously alleged claims or defenses.")

CONCLUSION

Congress and the Court have repeatedly recognized that the protection of environmental values, including critical wildlife habitat, are national in character. In apportioning the benefits of the flows of the North Platte River, equity requires that the Court take cognizance of the post-Decree laws designed to further environmental interests and to spread the burden of protecting critical wildlife habitat throughout the North Platte River Basin. Accordingly, the State of Nebraska respectfully requests that the Court grant leave to file its amended petition.

Respectfully submitted,

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Defendant.

CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that three true and correct copies of the foregoing Motion to Amend Petition for an Order Enforcing Decree and for Injunctive Relief, Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of Decree, and brief in support thereof were served on each of the following parties required to be served, in accordance with United States Supreme Court Rule 9.3, by depositing the same in the United States mail with first-class postage prepaid and addressed on this 11th day of January, 1988 to:

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